BABY M: A DISQUIETING DECISION

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Few escaped the publicity which surrounded *In re Baby M.*[1] During the trial proceedings, the evening news brought to the public the true-to-life soap opera of an infertile couple, who, having longed for a child, contracted with a woman to act as their "surrogate mother," only to find that she could not or would not surrender her baby. Many felt the Sterns' frustration and understood their determination in bringing their lifelong dream to fruition. Others cried with Mrs. Whitehead as she recounted in graphic detail the pain of relinquishing her daughter. In the heat of this emotional exchange, everyone took sides, the more enlightened cheering not for the Sterns or the Whiteheads, but for an infant girl, then less than one year old.

What aroused the sympathies of so many? Surrogacy is certainly not a universal experience. Plainly, deeper values were implicated. Counsel for the Whiteheads claimed that motherhood itself was on trial. The Sterns' attorneys reminded all of the joys of parenthood, the pain of infertility, and the worth of children in our society. Child advocates underscored society's responsibility to its children irrespective of a child's origins or any adult's claims to rights in a child's life.

Acutely aware of the competing values at stake, the New Jersey Supreme Court set to the task of reviewing the record on appeal. To some, the high court's opinion would sound a reaffirmance of traditional values, awakening our intuitive and romantic vision of motherhood, reminding us that there are "some things that money cannot buy."[2] Others would view the supreme court decision as unduly paternalistic and even sexist in its refusal to acknowledge the decisional autonomy of the participants to the surrogacy arrangement.

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1 *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

2 *Id.* at 440, 537 A.2d at 1249.

To constitutional scholars, however, the decision of the New Jersey Supreme Court would be remiss in its failure to properly analyze and weigh the competing constitutional claims of the principals. Here was fertile opportunity for the high court to pioneer the legal framework involved in the new reproductive technologies; to balance the right of privacy and self-determination, the right to the care and companionship of one's child, and issues involving the child's best interests and welfare. The New Jersey Supreme Court's refusal to test these competing claims of the parties in accordance with accepted constitutional analysis is unsettling.

Fundamental rights analysis requires that the individual's decisional autonomy be protected unless there exists an interest of the state so compelling that interference with the right is warranted. Moreover, the state's interest must be well defined and any infringement on the right must be the least restrictive and so narrowly drawn as to express the legitimate interest at stake.[3] That the procreative choice of an individual is a fundamental right falling within that zone of privacy constitutionally protected is without question. The private realm of family life historically accorded constitutional protection includes an individual's right to make personal decisions, free from governmental interference, relating to marriage,[4] procreation,[5] contraception,[6] abortion[7] and the decision to bear or beget a child.[8]

Commentators have often debated the ethical, moral and policy considerations involved in the surrogate parenting process. Opponents to surrogacy have argued that the potential harm to the child and to the surrogate mother militate against public acceptance of surrogate parenting arrangements. To the extent that these perceived evils of surrogacy might impact upon the parties' procreational liberty, the validity of any surrogate arrangement should be dependent upon whether any of these concerns rise to the level of a compelling state interest.

In what may appear to be a result-oriented analysis, the New Jersey Supreme Court did not employ the fundamental rights analysis utilized in other cases involving incidents of the right to privacy. Here, in the surrogacy context, the supreme court re-

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[3] Roe v. Wade, 410 U.S. 113, 153-55 (1973).
[4] Loving v. Virginia, 388 U.S. 1 (1967).
[5] Skinner v. Oklahoma, 316 U.S. 535 (1942).
[6] Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).
[7] Roe v. Wade, 410 U.S. 113 (1973).
[8] Eisenstadt v. Baird, 405 U.S. 438 (1972).

strictively viewed the constitutional right to procreate: "The right to procreate very simply is the right to have natural children, whether through sexual intercourse or artificial insemination. It is no more than that."[9] In viewing the procreative liberty so narrowly, the court concluded that its refusal to enforce the surrogate agreement would not implicate or interfere with William Stern's asserted right of procreation. William Stern did, in fact, achieve a biologically related offspring. Having found no infringement of a fundamental right, the New Jersey Supreme Court avoided scrutinizing the statutory proscriptions relating to adoption and termination of parental rights for monetary consideration as well as other policy issues within the accepted constitutional framework.

The fallacy in the court's analysis should be apparent. It is not the actual act of procreation which is significant, but the values and interests underlying the creation of a family, and the right of an individual to have and raise children in accordance with his or her beliefs.[10] It is these underlying values, not merely the sexual or reproductive act itself, which requires protection.

The *Baby M* decision is particularly disquieting in several other respects. The refusal to enforce a surrogate contract is unduly paternalistic and certainly sexist in its refusal to acknowledge the decisional autonomy of the female participant to the surrogate arrangement, namely the surrogate mother. Most disturbing, however, is the high court's insensitivity to an entire class of individuals: the infertile.

It is estimated that ten to fifteen percent of all married couples in the western world are unable to have children.[11] In one-half of these instances, the inability to reproduce is due to female infertility which may assume varied forms.[12] Conception may be impossible for a woman because she lacks ova or because a physical limitation prevents her ovum from being properly fertilized. Alternatively, conception may be possible for a woman but she may be unable to successfully carry the fetus to term without significant danger to herself or her unborn child. The shortage of adoptable children resulting from the increased availability and acceptance of contraceptives, abortion, and the less-

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[9] *In re* Baby M, 109 N.J. 396, 448, 537 A.2d 1227, 1253 (1988).

[10] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[11] *See Baby M*, 109 N.J. at 452 n.16, 537 A.2d at 1255 n.16.

[12] National Center for Health Statistics, Vital and Health Statistics, § 23, No. 11 at 13-16, 32 (Dec. 1982).

ened social stigma of being an unwed mother, further hinders the infertile couple's ability to create a family. Surrogate parenting had promised a viable alternative to these childless couples.

The practical effect of the supreme court opinion remains to be seen. The illegalization of surrogacy does not end its practice. The desire to reproduce bloodlines connecting future generations continues to exert a powerful and pervasive influence on the individual. The social and psychological significance attached to the reproductive process is compelling. It may well be that the drive to have children in our society is such that individuals will risk illegality and even criminal prosecution in their quest to create a family. The agents and brokers will continue to realize profits from surrogate contracts formally executed in other states. The supreme court may have merely transformed the grey market of surrogacy into a black market where infertile couples and potential surrogates still solicit one another.

Infertile couples are not without hope. The New Jersey Supreme Court's invitation to the legislature to address the surrogacy issue offers the opportunity to reexamine the implications of the new reproductive biotechnologies. More than an opportunity, it is our responsibility to explore the feasibility of these new technologies which emphasize the value of children in our society and bring the unique experience of parenthood to those who would otherwise be deprived, creating life and families in circumstances where not otherwise possible.